

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION
AT CINCINNATI
CIVIL CASE NO: 10-342-SAS-JGW**

CHARLES FINLEY,

PETITIONER,

V.

**WARDEN, WARREN
CORRECTIONAL INSTITUTION,**

RESPONDENT.

**REPORT AND RECOMMENDATION THAT RESPONDENT'S
MOTION TO DISMISS BE GRANTED**

This habeas corpus action, filed through counsel pursuant to 28 U.S.C. § 2254, is before the Court on Respondent's motion to dismiss. [Doc. 12]. According to Respondent, Petitioner received relief in the Ohio state court system when the First Appellate District concluded that Petitioner was wrongly convicted of both murder and felonious assault. The Hamilton County Court of Common Pleas has re-sentenced Petitioner and his conviction for felonious assault was merged with his murder conviction. Thus, since Petitioner's habeas corpus petition sought relief for the same grounds upon which the Ohio state courts granted him relief, Respondent contends that Petitioner's habeas corpus petition is now moot.

Petitioner does not object to dismissal. [Doc. 13]. Petitioner asks that the Court's order of dismissal include a finding that the petition was not frivolous, such that it would not count as one of his "three strikes" under 28 U.S.C. § 1915(g). Petitioner asserts that Respondent does not oppose such a finding.

Accordingly, **IT IS RECOMMENDED THAT:**

1. Respondent's unopposed motion to dismiss without prejudice [Doc. 12] should be

granted; and

2. The order of dismissal should recite that the Court finds that the action was not frivolous, malicious, and did not fail to state a claim upon which relief could be granted.

Date: January 20, 2011

s/ J. Gregory Wehrman
J. Gregory Wehrman
United States Magistrate Judge

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NOTICE

Attached hereto is the Report and Recommended Decision of the Honorable J. Gregory Wehrman, United States Magistrate Judge. Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations **within 14 days** after being served with this Report and Recommendation. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. A party may respond to another party's objections **within 14 days** after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140 (1985).